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APR 10 1991

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Request for Technical Advice Relating to Section 6653(g)

This is in reply to your request dated February 26, 1991, for technical advice concerning the application of the negligence penalty under section 6653 of the Code, prior to amendment of that section by the Omnibus Budget Reconciliation Act of 1989 (OBRA 89).

ISSUES

(1) On a timely filed return where the only audit adjustment being subjected to the negligence penalty is a failure to include income that was reported on an information return, does the 5 percent negligence penalty apply to the entire underpayment (i.e., deficiency) or to only that portion of the underpayment attributable to failure to include Form 1099 income?

(2) On a delinquent return where the only audit adjustment being subjected to the negligence penalty is a failure to include income that was reported on an information return, does the 5 percent negligence penalty apply to the entire underpayment (i.e., tax shown on return and deficiency) or to only that portion of the underpayment attributable to failure to include Form 1099 income?

CONCLUSIONS

On both a timely filed and a delinquent return, where the only audit adjustment being subjected to a negligence penalty is a failure to include income that was reported on an information return, the 5 percent negligence penalty applies to only that portion of the underpayment attributable to the failure to include Form 1099 income. If, however, one or more other audit adjustments are also due to negligence, the 5 percent negligence penalty applies to the entire underpayment.

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Section 6653(a) of the Code, prior to OBRA 89, provided that if any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to negligence, there shall be added to the tax an amount equal to 5 percent of the underpayment.

Section 6653(c) of the Code, prior to OBRA 89, provided that in the case of income tax, an underpayment means a deficiency as defined in section 6211, except that the tax shown on the return, as defined in section 6211(a)(1)(A) shall be taken into account only if the return was timely filed (determined with regard to extensions of time for filing).

Section 6653(g) of the Code, immediately prior to its repeal by OBRA 89, provided as follows:

If--

(1) any amount is shown on--

(A) an information return (as defined in section 6724(d)(1), or

(B) a return filed under section 6031, section 6037, section 6012(a) by an estate or trust, section 6050B, or section 6050E, and

(2) the payee (or other person with respect to whom the return is made) fails to properly show such amount on his return,

any portion of an underpayment attributable to such failure shall be treated, for purposes of subsection (a), as due to negligence in the absence of clear and convincing evidence to the contrary. If any penalty is imposed under subsection (a) by reason of the preceding sentence, only the portion of the underpayment which is attributable to the failure described in the preceding sentence shall be taken into account in determining the amount of the penalty under subsection (a).

Section 6653(g) clearly provides that only that portion of an underpayment which is attributable to failure to include an amount shown on an information return is subject to the "presumptive negligence" penalty of 5 percent under section 6653(a). This statement, however, is in direct conflict with IRM 4563.13(2)(a), which provides as follows:

Effective for returns due after December 31, 1985, the negligence penalty asserted under IRC 6653(g) applies to the underpayment of tax resulting from the payees failure to properly report amounts shown on information returns

That is, any portion of an underpayment attributable to such failure shall be treated, for purposes of IRC 6653(a), as due to negligence, and the negligence penalty will be asserted on the entire underpayment, unless clear and convincing evidence to the contrary is provided by the payee (Underscoring for emphasis)

The provisions of the IRM regarding the "presumptive negligence" penalty are clearly inconsistent with the provisions of section 6653(g) of the Code as quoted above. There appears to be an easy explanation for this inconsistency, however. Section 6653(g) was amended by Pub. L. 99-514 (Tax Reform Act of 1986) to include failure to report any amount that is shown on any information return (not just interest and dividend payments), effective for returns due after December 31, 1986. However, section 6653(g), as amended by Pub. L. 99-514, did not include the last sentence of that section which is quoted above in bold print. Section 6653(g) was again amended in 1988 by Pub. L. 100-647 (Technical and Miscellaneous Revenue Act of 1988) by adding at the end thereof the sentence that reads as above. This amendment was made retroactive to apply as if it had been included in amendments made by Pub. L. 99-514. (See Sec. 1015(b)(4) of Pub. L. 100-647). Pub. L. 100-647 was signed into law on November 10, 1988. IRM 4563.13 was issued on June 30, 1988, prior to enactment of Pub. L. 100-647. Because the IRM has not been updated to reflect the provisions of Pub. L. 100-647, it should not be followed. This matter is being brought to the attention of the Assistant Commissioner (Examination) for appropriate action.

The information submitted that the RARPLUS and MICRORAR report writing computer programs are producing different results in the computation of the presumptive negligence penalty for delinquent returns has been referred to Exam Automation function in the National Office for consideration and necessary action.

If you have any further questions concerning the technical advice furnished herein, contact Mrs. Gail Winkler at FTS 566-4442.

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(Signed) Norlyn D. Miller, Jr.

By _____
NORLYN D. MILLER, JR.
Senior Technician Reviewer, Br. 4

cc: Assistant Commissioner (Examination) EX